

1993

# Farrell G. and Vicki A. Forsberg v. Burningham & Kimball : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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FARRELL G. and VICKI A.  
FORSBERG,

Plaintiffs, Appellees/  
Cross-Appellants,

v.

BURNINGHAM & KIMBALL, et al.,

Defendants/Appellants/  
Cross-Appellees/ and  
Cross-Appellant.

UTAH COURT OF APPEALS

No. 930418-CA

930418

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PRIORITY 15

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REPLY BRIEF OF THE APPELLANTS  
CHRISTENSEN & KIMBALL, a Utah general partnership,  
and VICTOR M. KIMBALL

---

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL

DISTRICT COURT IN AND FOR SALT LAKE COUNTY

THE HONORABLE MICHAEL R. MURPHY, PRESIDING

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**FILED**

Utah Court of Appeals

MAR 02 1994

  
Mary T. Noonan  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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FARRELL G. and VICKI A.	)	
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Plaintiffs, Appellees/	)	
Cross-Appellants,	)	
	)	
v.	)	
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Defendants/Appellants/	)	
Cross-Appellees/ and	)	
Cross-Appellant.	)	

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**DETERMINATIVE CONSTITUTIONAL**  
**AND STATUTORY PROVISIONS**

None.

### **SUMMARY STATEMENT OF CASE**

In this case there are essentially two appeals. On the one hand, these Appellants initially appealed the Trial Court's findings with respect to negligent misrepresentation regarding the size of the property purchased by the Plaintiffs. In response, the Plaintiffs filed a Cross Appeal regarding the rulings of the Trial Court relating to the warranty of habitability.

The initial Brief of these Appellants dealt exclusively with the issues relating to negligent misrepresentation. The responsive Brief of the Plaintiffs addressed not only the negligent misrepresentation issues but also the warranty of habitability issues. By the stipulation of the parties and the order of this Court, the Defendant and Cross Appellee, Spectrum Development Corporation, shall respond to the issues with respect to the warranty of habitability.

Accordingly, this Reply Brief is limited to a response to matters raised by the Plaintiffs on the issue of the negligent misrepresentation.

### **ARGUMENT**

These Appellants, in their opening Brief, set out for this Court's review each and every shred of testimony and evidence regarding the supposed misrepresentations on the size of the property purchased by the Plaintiffs. The Plaintiffs have not produced for this Court's review any additional evidence or testimony. However, the Plaintiffs do make statements in their

Brief, regarding the evidence, which are wholly unfounded and bear no citations to the record itself.

For example, Plaintiffs assert in their Brief at page 18 that "the backyard was represented as 98' x 102'". There is no reference to the record as to where that representation was made. The reason that no citation is given is because the representation was never made. In truth, the Fact Sheet (Exhibit P-27) lists the yard size as 98' x 102'. However, no witness testified that they thought that reference was to the backyard. Neither of the Forsbergs so testified. Mr. Kimball, the Appellant, specifically denied ever having made such a representation. (R. 1164.)

It is only the argument of counsel which results in a finding that the backyard of the home was supposed to be 98' x 102'. This representation did not come from and is not a reasonable inference to be drawn from the evidence presented.

The Plaintiffs allege, in their Brief at page 19, that "at the time of the sale, the property was valued at \$3.85 per square foot". Again, there is no reference to the record. Once more, the reference is missing because the evidence is missing. No where in this trial did anyone ever testify as to the value of the property. The number of \$3.85 per square foot was the inference, deduction and/or unfounded calculation of counsel.

Also on page 19 of their Brief, the Plaintiffs state that:

"Dr. Forsberg measured the size of his backyard. This measurement was roughly drawn to scale on a diagram that the Trial Court accepted as Exhibit P-34. From these measurements, Forsbergs calculated that the backyard was only 4,342 square feet."



As with the other representations, there is no reference to the record for this information. The simple reason that references to record are missing is that no such information is contained within the record. Once more, the information and the calculations are nothing more than the arguments of counsel.

Plaintiffs, in their Brief, also misconstrue the duties imposed on buyer and seller by the decision in Dugan v. Jones, 650 P.2d 1239 (Utah 1980). Plaintiffs argue that the Dugan decision imposes upon the seller an absolute responsibility and duty to know the size of the property which he is selling. The Dugan decision stands for nothing more than the proposition that the vendor of property is under a duty to insure that his representations are truthful.

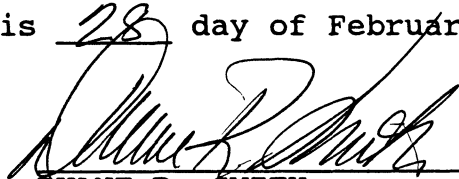
In the case at hand, the only representation which the Defendants made, and the only representation which the Plaintiffs agree that they made, was that they did not know where the exact property boundaries were. Plaintiffs admit that they heard Defendant say that the exact boundaries were unknown. Both Plaintiffs and Defendants admit that no representation was made that the size of the backyard itself was 98' x 102'.

#### **CONCLUSION**

The Brief of the Plaintiffs is its own best evidence as to the weaknesses of the case of Plaintiffs. When painted with a broad brush, it appears that we have a Dugan v. Jones case. However, a careful and specific analysis of the actual evidence reveals a far different picture. The Forsbergs knew and should have known that

further inquiry as to the exact size of their property was warranted. The Forsbergs had numerous opportunities for further inspection, which they did not take. The Forsbergs were not misled by any statement or representation of any Defendant. The calculation of their damages is created from whole cloth and has no basis in the facts or in the record.

RESPECTFULLY SUBMITTED this 28 day of February, 1994.

  
DUANE R. SMITH  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was served on the following individual by placing the same in the United States mail, postage pre-paid, this 26 day of February, 1994.

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